2009

Cheap-o-rooter, Inc., a Utah Corporation v. Marmalade Square Comdominium Homeownders Association, A Utah Corporation, Bruce Manka and Frank Guyman : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff/Appellee, vs. MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, BRUCE MANKA and FRANK GUYMAN Defendants/Appellants.	)	Court of Appeals No. 20090166

APPELLANTS' OPENING BRIEF

APPEAL FROM AN INTERLOCUTORY ORDER OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
THE HONORABLE JUDGE ROBERT P. FAUST, PRESIDING

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JURISDICTION OF THE COURT

The Utah Court of Appeals has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated 78A-4-103(2)(j) (2009) and Utah R. App. P. 5.

ISSUE PRESENTED FOR REVIEW

The sole issue presented for consideration by this appeal is whether the trial court committed reversible error in granting the Plaintiff's motion to set aside its default after the Appellee and its lawyer failed to appear for the scheduled trial in the matter.

Although "a trial court has broad discretion in deciding whether to set aside a default judgment," that "discretion is not unlimited." *Lund v. Brown,* 11 P.3d 277 (Utah 2000). The Utah Supreme Court will overturn a trial court's decision to set aside a default if it has abused its discretion. *See id.*

As a threshold matter, a trial court's ruling must be 'based on adequate findings of fact' and 'on the law.'" *Id.* (quoting *May v. Thompson,* 677 P.2d 1109, 1110 (Utah 1984) (per curiam)). While the trial court should exercise its discretion "in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing," *Helgesen v. Inyangumia,* 636 P.2d 1079, 1081 (Utah 1981), "[a] decision premised on flawed legal conclusions . . . constitutes an abuse of discretion." *Lund, supra* at 277. In the context of a denial of a rule 60(b) motion, the Court reviews ". . . a district court's findings of fact under a clear error standard of review." *Menzies v. Galetka,* 150 P.3d 480 (Utah 2006) (citing *Chen v. Stewart,* 123 P.3d 416 (Utah 2005)). The trial court's conclusions of law, however, are reviewed under a "correctness" standard which affords the trial court no deference," *id.* (citing *Richins v. Delbert Chipman & Sons Co.,* 817 P.2d 382, 385 (Utah Ct. App. 1991)).

Rule 60(b) allows a court "upon such terms as are just" and "in the furtherance of justice" to relieve a party from a judgment for "mistake,

inadvertence, surprise, or excusable neglect; . . . or . . . any other reason justifying relief." Utah R. Civ. P. 60(b). Presumably, Plaintiff's theory before the trial court was essentially one of excusable neglect. To demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" *Black's Title, Inc. v. Utah State Ins. Dep't.,* 991 P.2d 607 (UT. App 1999) (quoting *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)) (alteration in original). "In the absence of such a showing, [a defaulting party]'s assertion does not demonstrate his neglect was excusable." *Id.*

The Defendants preserved the issue as demonstrated by their Memorandum in Opposition to the Motion to Set Aside (R. 384-389).

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

There are no determinative constitutional or statutory provisions upon which Appellants rely. Rather, the issue raised in this matter is governed by Utah R. Civ. P. 60(b) and interpreting case law.

STATEMENT OF THE CASE

A. Nature of the Case.

The Plaintiff/Appellee filed this action seeking to obtain a judgment against the Defendants for drain and line cleaning services it rendered (R. 1-11).

Defendants have maintained throughout the proceedings that they are not responsible for charges related to the Plaintiff/Appellee's services. *See* Defendant/Appellants' Motion to Dismiss (R. 42-52); Defendant/Appellants' Second Motion to Dismiss (R. 68-81); Defendant/Appellants' Motion for Summary Judgment (R. 133-155, 164-171); and, Defendant/Appellants' Motion to Dismiss Second Amended Complaint (R. 218-237).

B. Course of Proceedings Below.

The Complaint in this case was filed on January 19, 2005 (R. 1). The Record is replete with motions to dismiss and for summary judgment filed by the Defendants/Appellants. *Id.* The Plaintiff, in an effort to combat the grounds for dismissal and summary judgment urged by the Defendants/Appellants, has amended its Complaint twice R. 107-08, 188-194). The Court has awarded attorney fees to the Defendants/Appellants based upon the Plaintiff's conduct (R. 195-96).

Ultimately, on July 8, 2008, the case was set for pretrial on July 22, 2008 (R. 325-26). At the time of the Pretrial Conference, the case was set for a bench trial on **October 14, 2008** at 9:30 a.m. (R. 328). However, the Notice of Bench Trial that was sent to counsel by the trial court, on July 22, 2008, set the trial date for **November 14, 2008** at 9:30 a.m. (R. 333-335). The Court docket will reflect that on July 25, 2008, the Court sent a Corrected Notice of Bench Trial to counsel changing

the trial date back to October 14, 2008 at 9:30 a.m., the date established at the time of the Pretrial Conference (R. 337-39).

On July 29, 2008, as a result of a conference call with the Court and both counsel, the trial date was changed to October 28, 2008, at 9:30 a.m., a date and time accepted by both counsel (340-41).

Both parties filed witness and exhibit designations as ordered by the trial court in preparation for trial (R. 350-55, 356-65). On the morning of trial, October 28, 2008, the Defendants/Appellants with counsel appeared. The Plaintiff and its counsel did not. The trial court then authorized the entry of the Plaintiff's default. However, the clerk mistakenly indicated in the minutes of the bench trial that it was the Defendants that did not appear (R. 366).

The Defendants/Appellants filed a motion with supporting memorandum and affidavit to correct the entry of default on October 30, 2008 (R. 367-71, 374-83). The Plaintiff/Appellee filed a two-page motion to set aside the default and set a new trial date on November 3, 2008 (R. 372-373). The Defendants/Appellants filed a memorandum in opposition to the Plaintiff/Appellee's motion to set aside the default (R. 384-89). The Plaintiff did not file a memorandum in support of its motion to set aside the default or in opposition to the Defendants motion to correct the default.

C. Disposition of the Trial Court

Although the trial court signed an Order correcting the minutes of the bench trial and entering the default of the Plaintiff/Appellee (R. 398-99), the trial court negated the effect of that Order and set aside the Plaintiff's default by Minute Entry dated February 4, 2009. The Minute Entry did not contain any findings of fact or underlying reasoning explaining the basis of the trial court's action (400-401). It is from that Order and Minute Entry that the Defendants/Appellants sought interlocutory appeal (R. 405-06).

STATEMENT OF FACTS

1. The Plaintiff initiated this action on January 19, 2005, more than four years ago, to obtain judgment against the Defendants for drain and line cleaning services that it provided in and around the Marmalade Square Condominium Development, located in Salt Lake County, State of Utah (R. 1-11).

2. The Defendants have vehemently denied responsibility for the charges associated with the services because a) the charges for the services of the Plaintiff were the responsibility of individual condominium owners not named in the action; b) the corporate entities sued by the Plaintiff in this case did not exist when the services were allegedly performed and are not responsible therefore; c) the person ordering and signing for the Plaintiff's services was not an agent or employee of

any of the Defendants; and d) most of the Plaintiff's invoices fail to identify the Marmalade condominiums as the area of service. *See* Defendant/Appellants' Motion to Dismiss (R. 42-52); Defendant/Appellants' Second Motion to Dismiss (R. 68-81); Defendant/Appellants' Motion for Summary Judgment (R. 133-155, 164-171); and, Defendant/Appellants' Motion to Dismiss Second Amended Complaint (R. 218-237).

3. On July 8, 2008, the trial court set the matter for pretrial conference on July 22, 2008 (R. 325-26). At the time of the Pretrial Conference, counsel for both parties appeared and the case was set for a bench trial on **October 14, 2008** at 9:30 a.m. (R. 328). However, the Notice of Bench Trial that was sent to counsel by the trial court on July 22, 2008, erroneously set the trial date for **November 14, 2008** at 9:30 a.m. (R. 333-335).

4. The Court docket reflects that on July 25, 2008, the Court sent a Corrected Notice of Bench Trial to counsel changing the trial date back to October 14, 2008 at 9:30 a.m., the date established at the time of the Pretrial Conference (R. 337-39).

5. On July 29, 2008, as a result of a conference call with the Court and both counsel, the trial date was changed to October 28, 2008, at 9:30 a.m., a date and time accepted by both counsel. A Notice of Rescheduled Bench Trial was then

sent to counsel on that same day, July 29, 2008 (R. 340-41, Addendum, Exhibit "A"). The Notice setting the matter for trial on October 28, 2008, was sent to the correct addresses for counsel and explicitly provided therein that nonappearance at trial could result in the entry of default of the non-appearing party. *Id.*

6. Both parties filed witness and exhibit designations as ordered by the trial court in preparation for trial (R. 350-55, 356-65).

7. On the morning of trial, October 28, 2008, at 9:30 a.m., the Defendants/Appellants, with counsel, appeared early, ready for trial. The judge set to try this case, Judge Robert P. Faust, was hearing another matter when the Defendants and their counsel arrived. Judge Faust waited fifteen minutes after the time set for trial, 9:30 a.m., and still, the Plaintiff and its counsel did not appear.

8. The trial court then authorized the entry of the Plaintiff's default based upon the nonappearance at trial and further authorized attorney fees attendant to the defense of the Plaintiff's action. However, when the clerk created the minutes of the scheduled bench trial, she mistakenly indicated that it was the Defendants instead of the Plaintiffs that did not appear at trial (R. 366, Addendum, Exhibit "B").

9. The Defendants/Appellants immediately filed a motion with supporting memorandum and affidavit to correct the erroneous entry of Defendants'

default and authorize the entry of the Plaintiff's default. The motion with supporting memorandum and affidavit was filed on October 30, 2008 (R. 367-71, 374-83, Addendum, Exhibit "C").

10. The Plaintiff/Appellee, on November 3, 2008, filed a two-page motion to set aside the Plaintiff's default and set a new trial date (R. 372-373, Addendum, Exhibit "D"). In the Motion, counsel for the Plaintiff asserted that he believed the trial date was November 14, 2008 instead of October 28, 2008. *Id.* However, counsel for the Plaintiff, in his motion, did not deny that he was privy to the conference call with the court and other counsel on July 29, 2008, setting the October 28, 2008 trial date. Further Plaintiff's counsel did not deny receiving the Notice of Rescheduled Bench Trial, setting the October 28, 2008 trial date (R. 340). Finally, the motion of the Plaintiff was unaccompanied by a memorandum, affidavit or other verified pleading. *Id.*

11. In the Affidavit submitted by counsel for Defendants/Appellants, counsel for the Defendants very carefully, under oath, recited the events that had resulted in the setting of the October 28 trial date, the events that transpired on the day of trial including the time that the trial court and counsel waited for the Plaintiff and the eventual order of the trial court for entry of default and authorizing of attorney fees (R. 374-81, Addendum Exhibit "C").

12. The Defendants/Appellants filed a memorandum in opposition to the Plaintiff's motion to set aside the default authorized by the trial court (R. 364-89, Addendum Exhibit "E"). In the memorandum the Defendants/Appellants explicitly outlined all the deficiencies of the Plaintiff's motion. *Id.*

13. Plaintiff did not file, in response to the Defendants' memorandum, any additional pleading supplementing its motion, such as a memorandum addressing the legal basis and adequacy of the Plaintiff's motion, an affidavit attesting to the factual basis of the motion, or any other evidence to support the motion.

14. On December 22, 2008, Judge Faust signed the Order Correcting Entry of Default, prepared by counsel for the Defendants (R. 398-399, Addendum Exhibit "F"). In relevant part, the Order stated:

> 1. The Court hereby relieves the Defendant from the default entered on October 28, 2008 against the Defendants.
>
> 2. The Court hereby enters the default of the Plaintiff, who failed to appear for trial on October 28, 2008.

Id.

15. Then on February 4, 2009, Judge Faust signed a Minute Entry that provided:

> This case came before the court for consideration of Defendant's Motion for Correction of Entry of Default and Plaintiff's Motion to Set Aside Default and Set New Trial Date. After review of the file and pleadings therein, the court rules that the default of any party previously entered is hereby set aside. The clerk is directed to set this case for a Pretrial Conference, so that settlement discussions may be

> affected and/or a mutually acceptable date for a Bench Trial may be set. This minute entry is the order of the court on this issue; no further order is required.

R. 400, Addendum, Exhibit "G".

16. Defendants/Appellants then filed their Petition seeking permission to Appeal from Judge Faust's February 4, 2009 Minute Entry (R. 405-06).

SUMMARY OF ARGUMENT

The Defendants/Appellants contend that the signed Minute Entry of February 4, 2009 (R. 400, Addendum, Exhibit "G") setting aside the default of the Plaintiff in this case constituted an abuse of discretion. Appellants submit that they are entitled to have the ruling encompassed in the Minute Entry setting aside the Plaintiff's default, reversed and the matter remanded to the district court for the assessment of attorney fees and costs.

The action taken by Judge Faust in signing the Minute Entry of February 4, 2009, constituted an abuse of discretion because first, the submission by the Plaintiff was deficient because it did not comply with Utah R. Civ. P. 7. The motion was filed without a memorandum and did not state a legal basis for the relief requested.

Second, in contravention of Utah R. Civ. P. 60(b) and the standard established by the Utah Supreme Court in *Erickson v. Schenkers,* 882 P.2d 1147

(Utah 1994), the Plaintiff/Appellee did not establish a basis for relief under the Rule (mistake, inadvertence or excusable neglect).[1] The Plaintiff failed to submit any evidence by way of verified pleading or affidavit that would even commence a Rule 60(b) examination. Further, the explanation given by Plaintiff for nonappearance does not meet the well-defined definition of mistake, inadvertence or excusable neglect. Specifically, the Plaintiff failed to demonstrate due diligence in establishing a Rule 60(b) basis.

Third, an examination of case law establishes that the facts set out in the Plaintiff's motion are deficient as a matter of law under the Rule 60(b) standard.

Fourth, the ruling of the trial court setting aside the default was deficient because it did not include the requisite findings of fact and conclusions of law that demonstrated conformity with the legal standard for evaluating a Rule 60(b) motion. Additionally, Rule 60(a) did not provide a basis for setting aside the default of the Plaintiff.

Lastly, the Defendants/Appellants are entitled to have this case remanded for the assessment of attorney fees and costs reasonably in the defense of this matter and on appeal.

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[1] The Plaintiff, in its Motion to Set Aside the Default (R. 372-73), never cited a legal basis for its motion. Appellants have assumed throughout the proceeding that the Plaintiff was filing under Utah R. Civ. P. 60(b). Appellants filed their memorandum in opposition to Plaintiff's motion based upon Rule 60(b) and the Plaintiff failed to file any further pleading identifying a different legal basis.

ARGUMENT

POINT I: THE PLAINTIFF'S APPLICATION FOR RULE 60(b) RELIEF IS DEFICIENT AS A MATTER OF LAW

The motion of the Plaintiff, seeking relief from the default was deficient as a matter of law because it failed to conform with any of the legal requirements attendant to the request.

A. The Plaintiff's Application for Relief Violated Utah R. Civ. P. 7.

In relevant part, Utah R. Civ. P. 7(b)(1) states:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. **A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.** (Emphasis added)

Id.

The Plaintiff's motion is completely devoid of any explanation of the legal basis or grounds upon which the Plaintiff relied. Further, Utah R. Civ. P. 7(c)(1) clearly requires a motion seeking to set aside a default to be accompanied by a supporting memorandum. Plaintiff failed to supply a supporting memorandum of any kind explaining the legal basis for the relief requested.

In *Holton v. Holton,* 243 P.2d 438 (Utah 1952), the Utah Supreme Court held that although the rules of civil procedure ". . . were intended to provide liberality in

procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing. . . It is only when a showing is made that some inadvertence, surprise, excusable neglect or mistake has occurred and that substantial injustice will be done, that a party will be relieved from failure to comply with the rules." *Id.*

The Rules of Procedure are to be interpreted in a manner to do substantial justice. Utah R. Civ. P. 8(f). However, the serving up of a request for relief that fails to inform other counsel and the court of the factual and legal basis therefore should not be tolerated. In this case, there was no supporting memorandum or affidavit that would fill in the blanks left by the motion. The pleading left all the work for the Defendants to try and figure out the basis of the motion and then respond thereto. Even after the inadequacy of the motion was pointed out, the Plaintiff failed to supplement the motion to provide the required factual and legal basis. Defendants submit that the complete failure to comply with Rule 7 should meet with a sanction. If the party requesting the relief does not put the work into the project to supply a legal basis, there should be no requirement for the other party and the court to respond thereto.

B. The Plaintiff's Motion Failed to Provide the Court with a Legal or Factual Basis for Relief.

The explanation provided in the Plaintiff's motion for the nonappearance at trial was, "[t]he Plaintiff believed the trial was set for November 14, 2008" (R. 372). The statement contained in the motion was not supported by an affidavit or verified pleading. The pleading did not cite a theory, rule or legal basis upon which the request was based. Utah R. Civ. P. 43(b) states:

> (b) Evidence on motions. **When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.** (Emphasis added)

Id.

One can analogize to the disposition of a motion for summary judgment. When a motion for summary judgment is made and supported as provided in Rule 56(c) of the Utah Rules of Civil Procedure, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or by submission of deposition testimony or other verified pleading, must set forth specific facts showing that there is a genuine issue for trial. *Cowen and Co. v. Atlas Stock Transfer Co.,* 695 P.2d 109 (Utah 1984); *see also Brigham Truck & Implement Co. v. Fridal,* 746 P.2d 1171, 1173 (Utah 1987) ("[B]are contentions, unsupported by any specifications of facts in support thereof, raise no material

questions of fact."); *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858 (Utah 2008).

The bare allegation that the Plaintiff thought the trial was on another day is simply insufficient as a matter of law to even create a Rule 60(b) issue. Certainly, after the Defendants/Appellants supplied a memorandum in opposition to the Plaintiff's motion and an Affidavit carefully setting out how the trial date was arrived at and noticed by the Court, the bare allegation of the Plaintiff did not create a justiciable issue of fact (R. 374-81).

Of course, there are a number of major facts that the bare allegation in the Plaintiff's motion does not address. First, was it the Plaintiff or his counsel that thought the trial was on another date? Second, does counsel for the Plaintiff dispute that he received the Notice from the trial court setting the trial date? Third, does counsel for the Plaintiff deny there was a telephone conference with other counsel and the court wherein the date for the trial was arrived at? Fourth, what facts are there that the Plaintiff acted with due diligence in recording the trial date, checking the calendar, informing the client, etc. Defendant would submit that if counsel for the Plaintiff was acting with due diligence, he would have sent the notice of trial to his client and calendared the date in his calendaring system. It is hard to understand how both the lawyer's office and the client could have missed the date if that simple

process of mailing the notice of trial was followed. However, because there was no evidence of due diligence submitted, there is no way to evaluate that critical issue.

Defendants/Appellants submit that the motion of the Plaintiff/Appellee was insufficient as a matter of law to constitute a claim for relief under Rule 60(b) of the Utah Rules of Civil Procedure. Therefore, the trial court did not have a legal or factual basis upon which he could exercise his discretion and relieve the Plaintiff from the default.

POINT II: THE ALLEGATION CONTAINED IN THE PLAINTIFF'S MOTION WAS INSUFFICIENT UNDER RULE 60(b)

Rule 60(b) of the Utah Rules of Civil Procedure, provides in relevant part as follows:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) **mistake, inadvertence, surprise, or excusable neglect**. . . . The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. . . The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (Emphasis added)

Id.

As established by the Utah Supreme Court in *Erickson v. Schenkers,* 882 P.2d 1147 (Utah 1994), in order to prevail on a motion to set aside a default judgment, the moving party must establish 1) that the motion seeking relief was timely filed (within three months); 2) that a basis for the relief has been established under the Rule (mistake, inadvertence or excusable neglect); and 3) that the party against whom the default has been entered has a meritorious defense on the merits. *Id. See also, Hernandez v. Baker,* 104 P.3d 664 (Utah App. 2004); *Black's Title, Inc.,* 991 P.2d 607 (Utah App. 1999); and *Lund v. Brown*, 11 P.3d 277 (Utah 2000).

If the Court finds that the Plaintiff/Appellee's motion was legally sufficient, there is no question that it was filed within three months of the entry of default. Additionally, since the Defendants/Appellants' multiple motions to dismiss and for summary judgment had been denied by the trial court, it must be assumed that the third element of having a prima facie case had been met for purposes of a Rule 60(b) motion.

Therefore, in determining the legal sufficiency of the Plaintiff/Appellee's motion, the Court must decide whether the stated ground contained in the Plaintiff's motion constitutes a basis for relief under the rule. In the two-page motion, the Plaintiff states:

> The Plaintiff believed that the trial date was November 14, 2008, and has prepared for that date. It appears that the trial date was originally

> set for November 14, 2008, and then changed to October 14, 2008 and then changed again to October 28, 2008. The Plaintiff believed the trial was set for November 14, 2008. . . .

R. 372-73, Addendum Exhibit "D"

As recited above, there are no affidavits or other verified pleadings that establish the circumstances surrounding the missing of the trial date. We do not know if Plaintiff's counsel recorded the trial date when it was set during the conference call with the court. We do not know if counsel recorded the trial date when the written notice from the court was received. We do not know if counsel sent a copy of the trial notice to his client. We do not know when counsel and his client met for trial preparation and how both the client and the lawyer could have been confused if they both had the written notice of the court.

It is the Defendant's contention that given the facts in this case, the Plaintiff cannot make out a case for mistake, inadvertence or excusable neglect in missing the trial because the Defendant failed to submit evidence of the circumstances attendant thereto. The facts are that the change of the trial date was done with the trial court and counsel in a telephone conference. An appropriate notice was sent to counsel thereafter and if the notice was recorded in the due course of business and

sent to the client, it would be utterly impossible for both the lawyer and client to miss the trial date.

A. The Plaintiff has not Established Mistake, Inadvertence, Surprise, or Excusable Neglect.

The case law is clear. It is not sufficient for a party or the lawyer, acting for the party, to simply claim that he did not appear at a trial because he had erroneously concluded that the trial was to be held on another day. The Utah Court of Appeals has held that "[t]o demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" *Black's Title, Inc., supra,* 991 P.2d 607 (Utah App. 1999) (quoting *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)) (alteration in original). In fact, the Utah Supreme Court has defined "excusable neglect" as "the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." *Mini Spas, Inc. v. Industrial Comm'n,* 733 P.2d 130, 132 (Utah 1987) (citing *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)).

In fact, in *Interstate Excavating v. Agla Dev. Corp.*, 611 P.2d 369 (Utah 1980), the Utah Supreme Court gave a thorough explanation of excusable neglect and due diligence:

> This Court has previously stated that neglect, to be excusable, must occur despite the exercise of due diligence. *Airkem Intermountain, Inc. v. Parker, supra,* footnote 5. Other jurisdictions have defined excusable neglect as "such as might have been the act of a reasonably prudent person under the same circumstances." *Kromm v. Kromm,* 191 P.2d 115 (Cal App. 1948). It has also been held that simple carelessness does not rise to the statutory standard, *Doyle v. Rice Ranch Oil Co.,* 81 P.2d 980 (Cal App. 1938), nor do simple business difficulties which allegedly prevent the dedication of adequate attention to the litigation in question. *Usery v. Weiner Bros., Inc.,* 70 F.R.D. 615 (D.C. 1976). Moreover, this Court has held that the failure of a party to appear in court, allegedly occasioned by failure of notice due to withdrawal of counsel, does not constitute such "excusable neglect" as to justify relief from judgment . . . . [citing case].

Id.

Because there is no evidence of due diligence, the simple fact that a party thought that trial was on another day, does not make out a Rule 60(b) case. A Party must show all that he or she did that could constitute due diligence and then claim that in spite of reasonable care and due diligence, the trial date was missed. In this case, the Plaintiff utterly failed to provide any proof of reasonable care or due diligence.

B. The Allegation in Plaintiff's Motion is Insufficient Under the Facts Presented in Other Cases Decided by the Utah Appellate Courts.

In *Allred v. Allred,* 2005 UT App 338 (2005), the district court entered judgment against the defendant after he failed to appear at the scheduled trial and

denied his motion for a new trial and for relief from judgment under Utah R. Civ. P. 59 and 60. *Id.* The Utah Appellate Court found that the district court mailed defendant a "notice of trial" which was signed by the district court judge. The notice timely and adequately described the nature of the proceedings against him. The Court of Appeals found that the district court's finding that defendant did not act with ordinary prudence or as a result of mistake, inadvertence, surprise or excusable neglect was well supported. *Id.*

In *Masters v. LeSeuer,* 13 Utah 2d 293, 373 P.2d 573 (1962), "the [defendant's] attorney thought he had filed an answer but . . . he had mistakenly not done so." *Id.* at 573. The Utah Supreme Court held that the trial court did not abuse its discretion in granting a default judgment in favor of the plaintiff when the evidence was that "the attorney then representing the plaintiff called the defendant's attorney's attention to the fact that the matter was in default and that a default judgment would be taken unless something was done." *Id.; see also Pacer Sport & Cycle, Inc. v. Myers,* 534 P.2d 616, 617 (Utah 1975) (finding no excusable neglect under rule 60 where defendant "assumed the action had been taken care of and therefore took no steps to file an answer to the complaint").

As noted above, the Utah Supreme Court has defined "excusable neglect" as "the exercise of 'due diligence' by a reasonably prudent person under similar

circumstances." *Mini Spas, Inc. v. Industrial Comm'n,* 733 P.2d 130, 132 (Utah 1987) (citing *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)). The Record in this case is entirely empty as to the Plaintiff's exercise of reasonable care and due diligence. There were simply no facts that could have been construed in favor of the Plaintiff's position that demonstrated that the Plaintiff and his lawyer took reasonable and ordinary steps to calendar the trial setting, circulate the notice thereof to the client and witnesses, met to prepare for trial, and then, in spite of efforts demonstrating reasonable care and due diligence, somehow missed the trial date.

POINT III: THE TRIAL COURT COMMITTED ERROR IN FAILING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW.

As noted in *Hunt v. Hunt*, 2004 UT App 2 (Ut Ct. App. 2004), "a trial court has broad discretion in deciding whether to set aside a default judgment." *Lund v. Brown*, 11 P.3d 277 (Utah 2000) (per curiam). However, a trial court's discretion is not limitless and "must be based on adequate findings of fact' and on the law.'" *Id.* (quoting *May v. Thompson*, 677 P.2d 1109, 1110 (Utah 1984) (per curiam)). Likewise, in *Davis v. Goldsworthy* , 184 P.3d 626 (Ut. Ct. App. 2008), the Court stated that while a trial court has considerable discretion with regard to Rule 60,

"[a] decision premised on flawed legal conclusions . . . constitutes an abuse of discretion." *Lund, supra.*

Of course, in this case, there is nothing in Judge Faust's signed Minute Entry of February 4, 2009, that reveals his thought process in deciding to set aside the default of the Plaintiff that was entered on December 22, 2008, barely two months before (R. 398-399. 400). Accordingly, the decision does not conform with the requirements established by this Court requiring sufficient findings and conclusions so that the decision process is clear on review. Based thereon, the ruling constituted an abuse of discretion warranting reversal.

However, the Defendants/Appellants contend that the Plaintiff's motion for relief is defective as a matter of law and therefore could not be used by the trial court to grant relief under Rule 60(b). The Plaintiff simply failed to provide the trial court with evidence of reasonable care and due process. Therefore the simple conclusion that the party was mistaken as to the trial date is insufficient as a matter of law.

Accordingly, Defendants request that this Court so rule that although the decision of the trial court was defective based upon the absence of findings, there was no record upon which an order relieving the Plaintiff from default could have been fashioned. There is one additional issue that should be addressed and that is

the inherent right of the trial court to correct clerical mistakes pursuant to Utah R. Civ. P. 60(a). The Rule provides:

> Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Id.

In *Lindsay v. Atkin*, 680 P.2d 401 (Utah 1984), the question addressed on appeal was whether the trial court abused its discretion by denying a motion to correct its earlier order "nunc pro tunc." The order dismissed a defendant, from the lawsuit "with prejudice," and defendant sought a change to reflect a dismissal "without prejudice." The Supreme Court affirmed the trial court's order refusing to correct the earlier order. *Id.*

The appellants sought relief pursuant to Utah R. Civ. P. 60(a). The Court started its analysis by noting the between clerical errors and judicial errors, stating:

> The distinction between a judicial error and a clerical error does not depend upon who made it. Rather, it depends on whether it was made in rendering the judgment or in *recording* the judgment as rendered. 46 Am. Jur. 2d Judgments § 202. *Richards v. Siddoway,* 24 Utah 2d 314, 317, 471 P.2d 143, 145 (1970) (emphasis added).

Id.

The Court continued and stated that the ". . . correction contemplated by Rule 60(a) must be undertaken for the purpose of reflecting the actual intention of the court and parties. 6A Moore's Federal Practice para. 60.60[1] (2d ed. 1983)." *Id.* The Court held that Rule 60(a) is not intended to correct errors of a substantial nature, particularly where the claim of error is unilateral. The fact that an intention was subsequently found to be mistaken would not cause the mistake to be "clerical." *See Bershad v. McDonough,* 469 F.2d 1333 (7th Cir. 1972).

The Court concluded:

> In the instant case, the error complained of may not be characterized as "clerical." The court may have erred in granting Parrish Oil Tools a dismissal with prejudice, but the appropriate remedy was a timely motion to amend and/or a timely appeal to this Court.

Id.

Defendants/Appellants submit that the setting aside of the Plaintiff's default was not clerical but was in response to the Plaintiff's motion. As such, a decision thereon had to be undertaken within the parameters of Rule 60(b) as discussed above. Because the trial court was not supplied sufficient evidence upon which to grant the Plaintiff relief, the setting aside of the default was an abuse of discretion regardless of the existence of findings and conclusions.

POINT IV: THE DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS INCLUDING FEES INCURRED ON APPEAL

If this Court reverses the Trial Court's Minute Entry, the default of the Plaintiff will be reinstated and the litigation will be concluded with the exception of the issue of attorney fees. At the time set for trial in this case, the trial court, in addition to authorizing the default of the Plaintiff, also authorized the award of attorney fees (*See* R. 391-395, 375 (para.13)). With the setting aside of the default, the issue of attorney fees was not decided.

Defendants/Appellants request an order of this Court awarding attorney fees and costs on appeal and either an order awarding the fees requested in the trial court (R. 391-95) or an order remanding the case to the district court for the assessment of attorney fees and costs.

The Plaintiff has throughout the proceeding, sought attorney fees based upon the language contained on the invoices (R. 2, para.8; 189, para. 10). The Defendants have likewise, throughout the proceeding, sought attorney fees based upon the "reciprocal attorney fee" provision contained in the Code (R. 64-65, Seventh Defense).

Utah Code Annotated 78B-5-826 (2005 as Amended) provides as follows:

> **Attorney fees -- Reciprocal rights to recover attorney fees.** A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or

> other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

Id.

Of course, the purpose of the section is to level the playing field by allowing either party to recover fees when only one party may assert such a right under a contract, remedying the unequal allocation of litigation risks built into many contracts. In addition, this statute rectifies the inequitable common-law result in which a party seeking to enforce a contract containing an attorney fees clause has a significant bargaining advantage over a party that seeks to invalidate the contract. *Bilanzich v. Lonetti*, 160 P.3d 1041 Utah 2007).

Illustrating the concept is *Myrah v. Campbell*, 163 P.3d 679 (UT App 2007) In that case by a landlord against tenants for breach of the rental agreement, the agreement provided that only the landlord could recover attorney fees. However, because the Code established reciprocal rights to recover attorney fees based on a written contract and because the tenants defeated some of the landlord's claims, the case was remanded to the trial court to determine the appropriate award of attorney fees. *Id.*

Given the equities of this case that include the Plaintiff's nonappearance at trial that subjected the Defendants to significant un-needed expense and the

Plaintiff's failure to comply with even the rudimentary basics of a Rule 60(b) application, subjecting the Defendants to significant post-decision and appeal expense, Defendants submit that an award of fees and costs both at the trial court and appeal level is appropriate.

CONCLUSION

Based upon the total absence of any facts that would demonstrate a basis under Rule 60(b), it is respectfully submitted that the trial court's Minute Entry of February 4, 2009 should be reversed and the case remanded for assessment of fees and costs at both the trial and appellate levels.

DATED this 26th day of May, 2009.

S. Hardy

Sarah Hardy, Esq.
Attorney for Defendants/Appellants

CERTIFICATE OF MAILING

I certify that a copy of the foregoing was mailed, postage prepaid to the following by first class mail, two copies of the foregoing brief on the 26th day of May, 2009. In addition a CD containing the PDF version of the foregoing was also included in the mailing.

Dennis L. Mangrum, Esq.
7110 South Highland Drive
Salt Lake City, Utah 84121

S. Hardy
Sarah Hardy, Esq.

ADDENDUM

Addendum
Exhibit "A"
Notice of Rescheduled Bench Trial

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

CHEAP O ROOTER, Plaintiff,	:	NOTICE OF RESCHEDULED BENCH TRIAL
vs.	:	Case No: 050901063 DC
MARMALADE SQUARE CONDOMINIUM H, Defendant.	:	Judge: JUDGE COLLECTION Date: July 29,2008

BENCH TRIAL.
Date: 10/28/2008
Time: 09:30 a.m.
Location: Fourth Floor - N41
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84114-1860
Before Judge: JUDGE COLLECTION
The reason for the change is Court Ordered

THIS BENCH TRIAL WILL NOT BE CONTINUED WITHOUT THE WRITTEN STIPULATION OF THE PARTIES AND/OR WITHOUT THE JUDGE'S APPROVAL.

UNAVAILABILITY OR NON-APPEARANCE OF COUNSEL OR PARTIES MAY RESULT IN DATES BEING SET WITHOUT COUNSEL'S INPUT, PLEADINGS MAY BE STRICKEN, COMPLAINT DISMISSED OR A DEFAULT ENTERED.

Please call Carol @ 238-7388 with any scheduling conflicts. The responsibility of contacting the other party(ies) is that of the party requesting the change.

Dated this 29th day of July, 2008.

_____
District Court Deputy Clerk

STATE OF UTAH
THIRD DISTRICT CO.
SALT LAKE CITY

Court's Notice of RESCHEDULED Bench Trial @V
VD26842562 pages:
050901063 MARMALADE SQUARE CONDOI

Case No: 050901063
Date: Jul 29, 2008

The Court will provide interpreters for criminal cases and domestic violence cases involving protective orders or stalking injunctions. (Fees in criminal cases may be imposed at the judge's discretion.) IF YOU NEED AN INTERPRETER IN A CRIMINAL CASE OR DOMESTIC VIOLENCE CASE PLEASE NOTIFY THE COURT at 238-7338 (five days before the hearing, if possible).

FOR ALL OTHER CASES, you must bring someone with you to interpret. If you do not know someone who can help you, the names of court interpreters you can hire are listed on the courts' website athttp://www.utcourts.gov/resources/interp/certified.html. If you do not have access to the internet, ask the court clerk to print off a copy of this list for you.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at 238-7500 at least three working days prior to the proceeding. (For TTY service call Utah Relay at 1-800-346-4128 or 711)

Case No: 050901063
Date: Jul 29, 2008

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050901063 by the method and on the date specified.

METHOD	NAME
Mail	DENNIS L MANGRUM Attorney PLA 7110 HIGHLAND DR SALT LAKE CITY, UT 84121
Mail	SARAH H YOUNG Attorney DEF 1781 SIDEWINDER DR STE 200 PARK CITY UT 84060

Dated this 30th day of July, 2008.

Deputy Court Clerk

Addendum
Exhibit "B"
Minutes of Bench Trial

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

CHEAP O ROOTER, Plaintiff,	:	MINUTES BENCH TRIAL
vs.	:	Case No: 050901063 DC
MARMALADE SQUARE CONDOMINIUM H, Defendant.	:	Judge: ROBERT FAUST Date: October 28, 2008

Clerk: patj

PRESENT

Plaintiff's Attorney(s): DENNIS L MANGRUM
Video
Tape Count: 9.30

TRIAL

COUNT: 9.30
This case is before the court for trial.
Defts did not appear.
The court enters the default of Marmalade Square Condominium.

Addendum
Exhibit "C"
Motion for Correction of Default

Sarah H. Young (11301)
YOUNG, KESTER & PETRO
Attorneys for Defendant
5532 Lillehammer, Ste. 104
Park City, Utah 84098
Telephone: (435) 649-7369
Facsimile: (435) 649-0246

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff, **v.** MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, Defendant.	**MOTION FOR URCP 60(a) CORRECTION OF ENTRY OF DEFAULT** Case No. 050901063 Judge Collection

COMES NOW, the Defendant, Marmalade Square Condominium Homeowners Association, by and through counsel, Sarah H. Young of Young, Kester and Petro, and moves the Court for a Correction of the Minute Entry, entered on October 28th, 2008 by this Court pursuant to Utah Rule of Civil Procedure 60(a). In support thereof, the Defendant has filed a Memorandum in Support hereof, filed contemporaneously herewith.

DATED this 30th day of October, 2008.

Sarah H. Young
SARAH H. YOUNG
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 30th day of October, 2008, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Dennis L. Mangrum
7110 South Highland Drive
Salt Lake City, Utah 84121

A. Paddock

Sarah H. Young (11301)
YOUNG, KESTER & PETR
Attorneys for Defendant
5532 Lillehammer, Ste. 104
Park City, Utah 84098
Telephone: (435) 649-7369
Facsimile: (435) 649-0246

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff, v. MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR URCP 60(a) CORRECTION OF ENTRY OF DEFAULT** Case No. 050901063 Judge Collection

COMES NOW, the Defendant, Marmalade Square Condominium Homeowners Association, by and through counsel, Sarah H. Young of Young, Kester and Petro, submits his Memorandum in Support of his Motion for Utah Rule of Civil Procedure 60(a) Correction of Entry of Default, filed October 28th, 2008. In support hereof, the Defendant states and alleges as follows:

STATEMENT OF FACTS

1. This matter was scheduled for trial on October 28, 2008.

2. The parties were sent notice of the trial on July 29, 2008.

3. Notice was sent to Dennis Mangrum at his correct address, 7110 Highland Dr., Salt Lake City, Utah 84121.

4. The Notice stated "Non-Appearance of Counsel or parties may result in ... a default entered."

5. On October 28, 2008, the Defendant and Defendant's counsel appeared at trial.

6. Neither the Plaintiff nor the Plaintiff's counsel was present.

7. The Court informed Defendant's counsel that it would enter default because the opposing party was not present, and informed Defendant's counsel they were free to leave. The Defendant's appearance was not made on the record, and the Court's representation was not stated on the record, because the Court was in the midst of another trial while this occurred.

8. Later on October 28, 2008, Defendant's counsel received a minute entry stating that the Court had entered default *against the Defendant*. The minute entry wrongly stated that Plaintiff's counsel, Dennis Mangrum, had appeared that morning, and that the Defendant was not present.

ARGUMENT

Utah Rule of Civil Procedure 60(a) states that "[c]lerical mistakes in ... orders ... may be corrected by the court at any time ... on the motion of any party...."

The Minute Entry entered by the Court on October 28, 2008, erroneously states that Dennis Mangrum was present at the October 28, 2008 trial, and that the Defendant failed to appear. In fact, Defendant's counsel, Sarah H. Young was present, along with co-counsel, Allen K. Young, Bruce Manka representative for Defendant Homeowners Association, and Defense

Witness Amanda Paddock. Neither Dennis Mangrum nor any representative for the Plaintiff was present. The Court communicated with Mrs. Young through its bailiff that because the other party was not present, the Court would enter default, and that therefore they were free to leave.

Defendant's counsel discovered later that default was incorrectly entered against the Defense, rather than against the Plaintiff who had failed to appear. The Defendant respectfully requests that the entry of default against the Defendant be corrected to reflect the *Plaintiff's* failure to appear at the trial scheduled on October 28, 2008.

DATED this 30th day of October, 2008.

S. Young

SARAH H. YOUNG
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 30th day of October, 2008, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Dennis L. Mangrum
7110 South Highland Drive
Salt Lake City, Utah 84121

A. Paddock

Sarah H. Young (11301)
YOUNG, KESTER & PETRO
Attorneys for Defendant
5532 Lillehammer, Ste. 104
Park City, Utah 84098
Telephone: (435) 6 49-7369
Facsimile: (435) 649-0246

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
450 S. State, Salt Lake City, Utah 84114

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff, v. MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, Defendant.	**AFFIDAVIT OF DEFENSE COUNSEL SARAH H. YOUNG IN SUPPORT OF 60(a) MOTION FOR CORRECTION OF ENTRY OF DEFAULT** Case No. 050901063 Judge Collection

SARAH H. YOUNG, Attorney for Defendant, having been first duly sworn, under oath, deposes and states as follows:

1. I am the attorney for the Defendant in this matter.

2. I am at least 18 years of age. I am an attorney duly licensed to practice law in the State of Utah. My bar number is 11301.

3. The trial in this matter was scheduled for trial on October 28, 2008.

4. The parties were sent notice of the trial on July 29, 2008.

5. No further notices have been sent out.

6. The notice was sent to me, and I received it. It was also sent to Dennis Mangrum at his correct address, 7110 Highland Dr., Salt Lake City, Utah 84121. *See* Exhibit A.

7. The Notice stated "Non-Appearance of Counsel or parties may result in ... a default entered."

8. On October 28, 2008, I appeared for trial at the correct courtroom, N41, at 9:15 am, 15 minutes early.

9. I arrived with co-counsel, Allen K. Young, and with a representative for the Defendant Corporation, Bruce Manka. Also present was the Defense witness, Amanda Paddock.

10. My appearance was not stated on the record, because the Court was busy conducting another trial at the time. The Court's bailiff approached me and, after I presented him with our notice of trial, attached as Exhibit A, the bailiff confirmed that our trial was scheduled on October 28, 2008 at 9:30 am in Courtroom N41. He asked me to attempt to meet with Plaintiff's counsel prior to trial to resolve as many issues as possible, and stated that the Court would try to hear our trial.

11. I waited for Plaintiff's counsel to appear, and neither Plaintiff's counsel nor the Plaintiff appeared for trial.

12. After the Court and the Defense waited for approximately 10-15 minutes, the Court informed Defense counsel through the bailiff that the Defense could leave, and that the Court would enter default based on the Plaintiff's failure to appear.

13. After inquiry from me through the bailiff, the Court asked me to file a request for attorney's fees to accompany my default paperwork.

14. None of the Court's nor my representations or appearances were made on the record, due to the trial that was being conducted at the time.

15. When I returned to my office, I received a minute entry that erroneously entered a default against my client, stating that neither me nor my client had appeared, and that Dennis Mangrum had been present at our trial that morning.

16. I state these facts and the foregoing voluntarily and of my own personal knowledge.

SARAH H. YOUNG
Attorney for Defendant

STATE OF UTAH)
) :ss
COUNTY OF SUMMIT)

SARAH H. YOUNG, *Attorney for Defendant*, is personally known to me or presented satisfactory proof of identity to me. After being sworn and while under oath he/she stated that he/she was acting voluntarily, had read and understood the preceding document, and that the contents were true. He/She then signed the document in my presence.

DATED this 31st day of October, 2008.

NOTARY PUBLIC
AMANDA LEIGH PADDOCK
576022
COMMISSION EXPIRES
08/06/2012
STATE OF UTAH

Notary Public

CERTIFICATE OF DELIVERY

I hereby certify that on this October 31, 2008, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Dennis L. Mangrum
7110 South Highland Drive
Salt Lake City, Utah 84121

A. Paddock

EXHIBIT A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

CHEAP O ROOTER, Plaintiff,	:	NOTICE OF RESCHEDULED BENCH TRIAL
vs.	:	Case No: 050901063 DC
MARMALADE SQUARE CONDOMINIUM H, Defendant.	:	Judge: JUDGE COLLECTION Date: July 29,2008

BENCH TRIAL.
Date: 10/28/2008
Time: 09:30 a.m.
Location: Fourth Floor - N41
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84114-1860
Before Judge: JUDGE COLLECTION
The reason for the change is Court Ordered

THIS BENCH TRIAL WILL NOT BE CONTINUED WITHOUT THE WRITTEN STIPULATION OF THE PARTIES AND/OR WITHOUT THE JUDGE'S APPROVAL.

UNAVAILABILITY OR NON-APPEARANCE OF COUNSEL OR PARTIES MAY RESULT IN DATES BEING SET WITHOUT COUNSEL'S INPUT, PLEADINGS MAY BE STRICKEN, COMPLAINT DISMISSED OR A DEFAULT ENTERED.

Please call Carol @ 238-7388 with any scheduling conflicts. The responsibility of contacting the other party(ies) is that of the party requesting the change.

Dated this 29th day of July, 2008

District Court Deputy Clerk

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

Case No: 050901063
Date: Jul 29, 2008

The Court will provide interpreters for criminal cases and domestic violence cases involving protective orders or stalking injunctions. (Fees in criminal cases may be imposed at the judge's discretion.) IF YOU NEED AN INTERPRETER IN A CRIMINAL CASE OR DOMESTIC VIOLENCE CASE PLEASE NOTIFY THE COURT at 238-7338 (five days before the hearing, if possible).

FOR ALL OTHER CASES, you must bring someone with you to interpret. If you do not know someone who can help you, the names of court interpreters you can hire are listed on the courts' website athttp://www.utcourts.gov/resources/interp/certified.html. If you do not have access to the internet, ask the court clerk to print off a copy of this list for you.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at 238-7500 at least three working days prior to the proceeding. (For TTY service call Utah Relay at 1-800-346-4128 or 711)

Case No: 050901063
Date: Jul 29, 2008

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050901063 by the method and on the date specified.

METHOD	NAME
Mail	DENNIS L MANGRUM Attorney PLA 7110 HIGHLAND DR SALT LAKE CITY, UT 84121
Mail	SARAH H YOUNG Attorney DEF 1781 SIDEWINDER DR STE 200 PARK CITY UT 84060

Dated this 30th day of July, 2008.

Deputy Court Clerk

Addendum
Exhibit "D"
Plaintiff's Motion to Set Aside Default

DENNIS L. MANGRUM #3687
Attorneys for Plaintiff
7110 South Highland Drive
Salt Lake City, Utah 84121
(801) 943-8107
(801) 943-4744 (Fax)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
450 South State St, Salt Lake City, Ut 84111; 801-238-7800

CHEAP-O-ROOTER, INC., a Utah Corporation.	:	**MOTION TO SET ASIDE DEFAULT AND SET NEW TRIAL DATE**
Plaintiff,	:	
vs	:	*CIVIL NO. :050901063*
MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a UtahCorporation	:	**Judge:** **DEBT COLLECTION**
Defendant.	:	

NOW COMES Plaintiff files this Motion to set aside the default of the Plaintiff and schedule a new trial date.

The plaintiff believed that the trial date was November 14, 2008, and has prepared for that date. It appears that the trial date was originally set for November 14, 2008, and then changed to October 14, 2008, and then changed again to October 28, 2008. The Plaintiff believed the trial was set for November 14, 2008. The Plaintiff did not receive a phone call or any kind of notice on October 28, 2008, that the trial was proceeding and the Defendants attorney knew the Plaintiff was ready for trial as exhibits and witness lists had been mailed only weeks earlier.

The Plaintiff believes that the changes in setting of the trial dates caused the

confusion and is the reason the Plaintiff did not appear on October 28, 2008. The Plaintiff has it's case prepared and witness ready for trial on November 28, 2008.

Nov. 3, 2008

Respectfully submitted,

Dennis L. Mangrum
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 3 day of Nov., 2008, I served the foregoing Motion to set aside the default, by: () depositing copies thereof in the United States mail, postage prepaid, addressed as follows, or by (x)FAXING copies to the numbers listed below :

Sarah H. Young
YOUNG, KESTER & PETRO
5532 Lillehammer Lane No. 104
Park City, Utah 84098

Addendum
Exhibit "E"
Defendants' Memorandum in Opposition to Plaintiff's Motion to Set Aside Default

Sarah H. Young (11301)
YOUNG, KESTER & PETRO
Attorneys for Defendant
5532 Lillehammer, Ste. 104
Park City, Utah 84098
Telephone: (435) 649-7369
Facsimile: (435) 649-0246

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
450 S. State, Salt Lake City, Utah 84114

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff, **vs.** MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, BRUCE MANKA and FRANK GUYMAN Defendants.	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO THE PLAINTIFF'S RULE 60(b) MOTION TO SET ASIDE DEFAULT** Case No. 050901063 DC Judge: CJ

The Defendants, Marmalade Square Condominium Homeowners Association and Bruce Manka, by and through their counsel submit the following memorandum in opposition to the Plaintiff's motion to set aside the default entered by the Court.

STATEMENT OF FACTS

1. On July 22, 2008, this matter was originally set for trial on November 14, 2008.

2. The Court docket will reflect that on July 25, 2008, the Court sent a correcting

notice to the parties changing the trial date from November 14, 2008 at 9:30 a.m. to the same time on October 14, 2008.

3. On July 29 and 30, 2008, as a result of a conference call with the Court and the two counsel, the trial date was changed to October 28, 2008, at 9:20 a.m., a date and time cleared with the offices of both counsel.

4. Counsel for the Plaintiff prepared a pretrial order and submitted notice of the witnesses and exhibits that he intended to use at the time of trial. Likewise, counsel for the Defendants submitted the required filings.

5. On the day of trial, the Defendants and their counsel were present and prepared for trial. The Plaintiff did not appear in person or by counsel.

6. The court has erroneously entered the default of the Defendants as opposed to entering of the default of the Plaintiff, who failed to appear. Counsel for the Defendants has submitted a Rule 60(a) motion to correct the clerical error.

7. Neither Plaintiff nor its counsel, in its motion for Rule 60(b) relief, has provided the Court with any basis cognizable under Rule 60(b), to justify relieving the Plaintiff from the consequences of its failure to appear at trial.

8. This case was filed on January 19, 2005 and therefore has been pending for over three- and-one-half years. The case has already produced one notice from the Court of its intent to dismiss for failure to prosecute.

ARGUMENT

POINT I:

ONLY THE DEMONSTRATION OF A TIMELY APPLICATION, PROPER GROUNDS AND A DEFENSE ON THE MERITS JUSTIFIES THE SETTING ASIDE OF A DEFAULT JUDGMENT.

Rule 60(b) of the Utah Rules of Civil Procedure, provides in relevant part as follows:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. . . The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As established by the Utah Supreme Court in *Erickson v. Schenkers,* 882 P.2d 1147 (Utah 1994), the Court held that in order to prevail on a motion to set aside a default judgment, the moving party must establish 1) that the motion seeking relief was timely filed (within three months); 2) that a basis for the relief has been established under the Rule (mistake, inadvertence or excusable neglect); and 3) that the party against whom the default has been entered has a meritorious defense on the merits. *Id. See also, Hernandez v. Baker,* 104 P.3d 664 (Utah App. 2004); *Black's Title, Inc.,* 991 P.2d 607 (Utah App. 1999); and *Lund v. Brown,* 11 P.3d 277 (Utah 2000).

The Utah Court of Appeals has held that "[t]o demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing **by circumstances over which he had no control.**'" *Black's Title, Inc.,*

991 P.2d 607 (Utah App. 1999) (quoting *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)) (alteration in original) (emphasis added). The Utah Supreme Court has defined "excusable neglect" as "the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." *Mini Spas, Inc. v. Industrial Comm'n,* 733 P.2d 130, 132 (Utah 1987) (citing *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)).

In *Erickson*, the Court determined that a defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried. *Id.*

POINT II:

THE PLAINTIFF HAS FAILED TO MEET THE REQUIREMENTS TO ALLOW THIS COURT TO SET ASIDE THE DEFAULT JUDGMENT.

In applying the law to the facts of this case, it is respectfully submitted that the Plaintiff has failed to comply with the critical requirements of the Rule. The only element that the Plaintiff has met is the time requirement. Plaintiff filed its motion for relief within three months of the entry of the default judgment in this case, which occurred on October 28, 2008.

The Plaintiff has failed to demonstrate a factual basis that falls within the Utah Supreme Court's definition of "mistake, inadvertence or excusable neglect." The trial date that was set in this matter was established by counsel for the parties and the Court on a conference call. Notice of the trial date was sent to the attorneys by the court. The parties acted in conformity with the Court's instruction in filing a pretrial order and filing notices relating to witnesses and exhibits that were to be used at trial. No effort was taken by the Plaintiff prior to the morning of trial to obtain a continuance or otherwise modify the trial date and time. The Plaintiff does not contend that the trial date was set without consulting its counsel and does not contend that it did not receive notice of the trial. Further, if counsel for the Plaintiff acted in accordance with his

responsibility, notice of the trial was both in the hands of counsel and the hands of the representatives of the Plaintiff, who would have received a copy of the notice from counsel.

In *Allred v. Allred,* 2005 UT App 338 (2005), the district court entered judgment against the defendant after he failed to appear at the scheduled trial and denied his motion for a new trial and for relief from judgment under Utah R. Civ. P. 59 and 60. *Id.* The Utah Appellate Court found that the district court mailed defendant a "notice of trial" which was signed by the district court judge. The notice timely and adequately described the nature of the proceedings against him. The Court of Appeals found that the district court's finding that defendant did not act with ordinary prudence or as a result of mistake, inadvertence, surprise or excusable neglect was well supported. *Id.*

In *Masters v. LeSeuer,* 13 Utah 2d 293, 373 P.2d 573 (1962), "the [defendant's] attorney thought he had filed an answer but . . . he had mistakenly not done so." *Id.* at 573. The Utah Supreme Court held that the trial court did not abuse its discretion in granting a default judgment in favor of the plaintiff when the evidence was that "the attorney then representing the plaintiff called the defendant's attorney's attention to the fact that the matter was in default and that a default judgment would be taken unless something was done." *Id.; see also Pacer Sport & Cycle, Inc. v. Myers,* 534 P.2d 616, 617 (Utah 1975) (finding no excusable neglect under rule 60 where defendant "assumed the action had been taken care of and therefore took no steps to file an answer to the complaint").

As noted above, the Utah Supreme Court has defined "excusable neglect" as "the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." *Mini Spas, Inc. v. Industrial Comm'n,* 733 P.2d 130, 132 (Utah 1987) (citing *Airkem Intermountain, Inc. v. Parker,* 30 Utah 2d 65, 513 P.2d 429, 431 (1973)). No one could argue that failing to appear, for no

reason, at trial in a case pending for over three years, when adequate notice was sent and received, that had been set by stipulation, portrays due diligence.

CONCLUSION

Based upon the total absence of any facts that would demonstrate a basis under Rule 60(b), the Plaintiff's motion to set aside the default should be denied.

DATED this 14th day of November, 2008.

S. Young

Sarah H. Young, Esq.
Attorney for Defendant Marmalade

CERTIFICATE OF FAXING AND MAILING

I certify that a copy of the foregoing was faxed and mailed, postage prepaid to the following by first class mail, on the 14th day of November, 2008.

Dennis L. Mangrum, Esq.
7110 South Highland Drive
Salt Lake City, Utah 84121

Amanda Puddock

Addendum
Exhibit “F”
Order Correcting Entry of Default

Sarah H. Young (11301)
YOUNG, KESTER & PETRO
Attorneys for Defendant
5532 Lillehammer, Ste. 104
Park City, Utah 84098
Telephone: (435) 649-7369
Facsimile: (435) 649-0246

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

CHEAP-O-ROOTER, INC., a Utah Corporation, Plaintiff, **v.** MARMALADE SQUARE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Utah Corporation, Defendant.	**ORDER CORRECTING ENTRY OF DEFAULT** Superseded by 2/4/09 Minute Entry Case No. 050901063 Judge Collection

This matter came on regularly before the Court on Defendant's Motion for 60(a) Correction of the Entry of Default entered against the Defendant on October 28, 2008. The Court finds that the Defendant and Defendant's counsel appeared for trial on October 28, 2008, and that both the Plaintiff and Plaintiff's counsel failed to appear. The Court, therefore, for good cause appearing, having reviewed the pleadings on the file, and being fully advised in the premises, and hereby ORDERS, ADJUDGES, and DECREES as follows:

ORDER

1. The Court hereby relieves the Defendant from the default entered on October 28, 2008 against the Defendant.

2. The Court hereby enters the default of the Plaintiff, who failed to appear for trial on October 28, 2008.

DATED this 2nd day of December, 2008.

BY THE COURT:

COLLECTION JUDGE

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

RULE 7 NOTICE

You will please take notice that the undersigned attorney for Defendant has submitted the above and foregoing Order to the Court for signature. Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, any objection to the form of the Order should be filed with the Court within five days after service upon you of this notice.

DATED this 30th day of October, 2008

SARAH H. YOUNG

CERTIFICATE OF DELIVERY

I hereby certify that on the 30th day of October, 2008, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Dennis L. Mangrum
7110 South Highland Drive
Salt Lake City, Utah 84121

A Paddock

Addendum
Exhibit "G"
Minute Entry Setting Aside Plaintiff's Default

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

CHEAP O ROOTER, Plaintiff,	:	MINUTE ENTRY
vs.	:	Case No: 050901063
MARMALADE SQUARE CONDOMINIUM H, Defendant.	:	Judge: JUDGE COLLECTION Date: February 4, 2009

This case came before the court for consideration of Defendant's Motion for Correction of Entry of Default and Plaintiff's Motion to Set Aside Default and Set New Trial Date. After review of the file and pleadings therein, the court rules that the default of any party previously entered is hereby Set Aside. The clerk is directed to set this case for a PreTrial Conference, so that settlement discussions may be effected and/or a mutually-acceptable date for a new Bench Trial may be set. This minute entry is the order of the court on this issue; no further order is required.

Robert P. Faust
Judge JUDGE COLLECTION

By _____
STAMP USED AT DIRECTION OF JUDGE

Case No: 050901063
Date: Feb 04, 2009

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050901063 by the method and on the date specified.

METHOD	NAME
Mail	DENNIS L MANGRUM Attorney PLA 7110 HIGHLAND DR SALT LAKE CITY, UT 84121
Mail	SARAH H YOUNG Attorney DEF 5532 LILLEHAMMER LN STE 104 PARK CITY UT 84098

Dated this 5th day of February, 2009.

Deputy Court Clerk